

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(DIVISION 2)

CUZ18 v Minister for Immigration, Citizenship and Multicultural Affairs

[2024] FedCFamC2G 482

File number: MLG 1512 of 2018

Judgment of: **JUDGE LADHAMS**

Date of judgment: 31 May 2024

Catchwords: **MIGRATION** – application for judicial review of a decision made by a delegate of the Minister to refuse to grant the applicant a protection visa – whether the delegate denied the applicant procedural fairness – whether the applicant was unable to effectively participate in an interview with the delegate due to health or interpretation issues – whether the delegate erred in failing to consider the effect of a data breach on the applicant – no jurisdictional error – application dismissed.

Legislation: *Migration Act 1958* (Cth) ss 5, 5AA, 5H, 36, 57, 91WA, 476, 477
Federal Circuit and Family Court of Australia Act 2021 (Cth) s 190

Cases cited: *AYY17 v Minister for Immigration and Border Protection* (2018) 261 FCR 503; [2018] FCAFC 89
Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2022) 289 FCR 21; [2022] FCAFC 3
Hossain v Minister for Immigration and Border Protection (2018) 264 CLR 123; [2018] HCA 34
LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2024) 98 ALJR 610; [2024] HCA 12
Minister for Immigration and Border Protection v SZMTA (2019) 264 CLR 421; [2019] HCA 3
Minister for Immigration and Citizenship v SZNCR [2011] FCA 369
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259; [1996] HCA 6
NABE v Minister for Immigration and Indigenous Affairs (No 2) (2004) 144 FCR 1; [2004] FCAFC 263

Division:	Division 2 General Federal Law
Number of paragraphs:	85
Date of last submission:	1 May 2024
Date of hearing:	2 April 2024
Place:	Perth (via Microsoft Teams)
Applicant:	The applicant appeared in person
Counsel for the Respondent:	Mr A Yuile
Solicitor for the Respondent:	Clayton Utz

ORDERS

MLG 1512 of 2018

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN: **CUZ18**
 Applicant

AND: **MINISTER FOR IMMIGRATION, CITIZENSHIP AND**
 MULTICULTURAL AFFAIRS
 Respondent

ORDER MADE BY: JUDGE LADHAMS

DATE OF ORDER: 31 MAY 2024

THE COURT ORDERS THAT:

1. The application is dismissed.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE LADHAMS:

INTRODUCTION

- 1 The applicant is a non-citizen who applied for a protection visa in Australia, claiming to be a stateless Faili Kurd. A delegate of the Minister refused to grant him a protection visa. The applicant, who is an ‘excluded fast track review applicant’ and therefore did not have any right to merits review of the delegate’s decision, seeks judicial review of the delegate’s decision, invoking the Court’s jurisdiction under s 476 of the *Migration Act 1958* (Cth) (Migration Act).
- 2 The applicant asserts jurisdictional error on the basis that the delegate made an error of law or denied the applicant procedural fairness in finding that the applicant:
 - (a) did not have a reasonable explanation for producing a bogus document;
 - (b) was not a person in respect of whom Australia has protection obligations; and
 - (c) was an excluded fast track review applicant.
- 3 The applicant made additional assertions of jurisdictional error at the hearing, including that:
 - (d) he was unable to effectively participate in the interview with the delegate because of his health issues and because he could not understand the interpreter well; and
 - (e) the delegate should have considered whether he engaged Australia’s protection obligations as a person whose personal information was disclosed in a data breach in 2014.
- 4 For the reasons explained below, the applicant has not established that the delegate made a jurisdictional error. The application for judicial review is therefore dismissed.

VISA APPLICATION

- 5 The applicant entered Australia by sea in January 2013 and is an unauthorised maritime arrival within the meaning of s 5AA of the Migration Act.
- 6 The applicant applied for a protection visa on 31 March 2016. The applicant’s claims for protection were set out in a statement that accompanied his protection visa application. The applicant claimed to fear harm from the Iranian authorities and government on the basis of his ethnicity as a Faili Kurd, his religion as a Shia Muslim, his nationality as a stateless

person and his status as an undocumented person in Iran. The applicant provided with his application documents in relation to his identity, including a foreign residence card (Blue Card) and a school certificate.

7 On 17 February 2017 the applicant attended an interview with an officer of the Department to discuss his claims for protection. After the interview, on 8 March 2017 the applicant by his representative provided written submissions and supporting documentation relating to the applicant's health to the Department.

8 On 25 August 2017 the Department sent to the applicant an invitation to comment in relation to a bogus document as evidence of his identity, nationality or citizenship for the purpose of his protection visa. The document the delegate suspected was bogus was the Blue Card provided by the applicant. The letter relevantly provided:

If a delegate of the Minister finds that you provided a bogus document as evidence of your identity, nationality or citizenship for the purpose of your protection visa application, the grant of your protection visa will be prevented by section 91WA(1) of the Migration Act 1958 and your protection visa application will be refused unless a delegate of the Minister is satisfied that you have a reasonable explanation for providing the bogus document and either provide documentary evidence of your identity, nationality or citizenship, or take reasonable steps to provide such evidence.

Under subsection 5(1) of the Migration Act 1958, a bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- a) purports to have been, but was not, issued in respect of the person; or
- b) is counterfeit or has been altered by a person who does not have authority to do so; or
- c) was obtained because of a false or misleading statement, whether or not made knowingly.

A delegate of the Minister reasonably suspects that the 'Blue Card' you state was issued to you by the Iranian authorities, and that you provided as evidence of your identity, nationality or citizenship, is counterfeit and therefore meets the definition of bogus document, as outlined above.

...

Separately, if you do not have a reasonable explanation for providing, giving or presenting a 'bogus document' to the Department in support of your Protection visa application, and if your application is subsequently refused under section 65 of the Act, you may be assessed to be an 'excluded fast track review applicant', under paragraph 5(1)(a)(vi) of the Act. This means that if you are refused the grant of a Protection visa, your case cannot be reviewed by the Immigration Assessment Authority.

9 On 19 September 2017 the applicant by his representative provided written submissions to the Department in response to the invitation to comment.

10 On 7 May 2018 a delegate of the Minister refused to grant the applicant a protection visa.

SUMMARY OF THE DELEGATE’S DECISION

11 The delegate found that the Blue Card provided by the applicant as evidence of his identity, nationality or citizenship was a bogus document and that it was provided by the applicant to present himself as stateless for the purposes of strengthening his protection claims. The delegate considered the applicant’s explanations for providing the Blue Card. The delegate was satisfied that the applicant was an Iranian citizen and that he was aware that he was not entitled to a Blue Card. The delegate found that the applicant did not have a reasonable explanation for providing a bogus document as evidence of his identity, nationality or citizenship. Therefore s 91WA(1) of the Migration Act prevented the grant of a protection visa to the applicant.

12 The delegate continued to make findings on the applicant’s identity and protection claims.

13 The delegate did not find the applicant to be a credible witness. In finding that the applicant was not stateless and was instead an Iranian citizen, the delegate:

- (f) found that the applicant provided inconsistent evidence in relation to the citizenship of his family members, the timeline around his family’s expulsion from Iran and identity documents that he could provide for the purposes of establishing his identity, and found that his paternal family were not stateless in Iran;
- (g) found that the applicant knew little about what it meant to be of Faili Kurdish ethnicity and appeared to confuse Faili Kurdish ethnicity with statelessness, and found that this did not support the applicant’s claim to be a stateless Faili Kurd;
- (h) considered that the applicant’s explanation as to why his family could not provide him with the original copy of his own Blue Card was unusual and was not satisfied that the applicant could not provide his Blue Card because his family was applying for citizenship;
- (i) found that the applicant and his family’s earning capacity indicated that it was unlikely that they were stateless; and
- (j) did not accept that the applicant departed Iran using a false or altered Iraqi passport and considered it more likely that he departed Iran using an Iranian passport.

14 Given that the delegate was not satisfied that the applicant was stateless and found that he was an Iranian citizen, the delegate found that the applicant did not have a well-founded fear

of persecution on account of his nationality or lack thereof, now or in the reasonably foreseeable future.

- 15 The delegate considered the applicant's personal circumstances and was not satisfied that the applicant had a particular profile in Iran or that he was a person of ongoing or serious interest to the Iranian authorities at the time of his departure. The delegate considered that the harassment or discrimination that the applicant may face as a Faili Kurd would not constitute serious harm and found that the applicant did not have a well-founded fear of persecution in Iran on account of being a Faili Kurd.
- 16 The delegate found that the applicant did not face a well-founded fear of persecution on account of his Shia Muslim religion, noting that Shia Muslims are the overwhelming majority religious group in Iran and that the applicant did not claim to have experienced any past issues on account of his religion.
- 17 The delegate was satisfied that the applicant was not politically active and was not suspected of being politically active in Iran. The delegate did not accept that the presence of scars on the applicant's face would give rise to a suspicion that he was politically active and found that the applicant did not have a well-founded fear of persecution on account of a real or imputed political opinion.
- 18 Having considered country information and the applicant's profile, the delegate found that the applicant faced only a remote chance of harm as a failed asylum seeker from a western country. The delegate also found that the applicant did not have a well-founded fear of severe economic vulnerability that would amount to persecution.
- 19 The delegate was not satisfied that the applicant is a refugee as defined in s 5H(1) of the Migration Act and was not satisfied that the applicant satisfied the refugee criterion in s 36(2) (a) of the Migration Act. Based on the same findings of fact, the delegate was not satisfied that the applicant would face a real risk of significant harm and found that the applicant did not meet the complementary protection criterion in s 36(2)(aa) of the Migration Act.
- 20 The delegate found that the applicant was an 'excluded fast track review applicant' because, without reasonable explanation, he provided a bogus document to an officer of the Department in support of his protection visa application.

JUDICIAL REVIEW APPLICATION

21 The applicant filed his application on 31 May 2018, which is within 35 days of the delegate's decision as required by s 477(1) of the Migration Act.

22 The applicant advances the following grounds:

1. The findings of the delegate of the Minister ('The Respondent') that the applicant did not have a reasonable explanation for producing the bogus document and therefore did not satisfy section 91W(2) of the *Migration Act 1958* ('The Act') is affected by an error of law and/denial of procedural fairness.
2. The Respondent's finding that the applicant is not a person in respect of whom Australia has protection obligations in accordance with s36(2)(a) of the Act is affected by an error of law and/or denial of procedural fairness.
3. The Respondent's finding that the applicant is an 'excluded fast track review applicant', which excludes the applicant from review under Part 7AA of the Act, is affected by an error of law and/or denial of procedural fairness and/or breach of section 57 of the Act.
4. I have made an application for assistance through Victoria Legal Aid and am waiting for a decision.

23 The applicant's application was filed together with an affidavit annexing the delegate's decision.

24 Pursuant to an Order made by a Registrar of this Court on 21 August 2019, the applicant was required to file and serve 28 days before the final hearing any amended application, any supplementary court book, and written submissions. The applicant did not file any documents in accordance with the Order. The Minister filed and served written submissions ahead of the hearing.

25 At the hearing, in the course of making oral submissions, the applicant raised additional issues that were not raised in his grounds and that were not the subject of relevant evidence. These issues include:

- (k) he could not properly understand the interpreter at the interview he attended;
- (l) he was very unwell at the time of the interview; and
- (m) his personal information was released as part of the 2014 data breach.

26 At the hearing, I explained to the applicant that I could not make a finding in his favour in the absence of evidence and I made orders granting leave to the applicant to file additional evidence and submissions and for the Minister to file submissions and evidence in response.

27 The applicant filed written submissions on 16 April 2024 and an affidavit on 19 April 2024. The affidavit annexes a number of documents, including:

- (n) documents relating to the 2014 data breach by the Department, including:
 - (i) a letter from the Department to the applicant dated 14 March 2014 advising him that some of his personal information had been accessible on the Department's website for a short time;
 - (ii) a letter dated 30 January 2019 from the Department of Home Affairs inviting the applicant to make a submission to the Office of the Australian Information Commissioner (OAIC) about the data breach;
 - (iii) a letter dated 9 April 2019 from Refugee Advice and Casework Service to the OAIC regarding the 2014 data breach; and
 - (iv) a statement of the applicant to the OAIC dated 4 April 2019; and
- (o) documents relating to the applicant's health and medical conditions, including:
 - (i) a letter dated 17 June 2019 from the Royal Melbourne Hospital to a doctor regarding the applicant's health condition;
 - (ii) a letter dated 10 April 2024 from a mental health clinician from Cabrini Outreach to the Court regarding support provided to the applicant since 2019;
 - (iii) a letter dated 20 June 2013 from the Department of Neurosurgery of the North Metropolitan Health Service to a doctor at the Yongah Hill Immigration Detention Centre regarding the applicant's health conditions;
 - (iv) support letters dated 20 November 2019 and 22 April 2020 from Cabrini Outreach regarding the applicant's application for or continuation of the Status Resolution Support Services Program;
 - (v) documents relating to an application by the applicant to access the National Disability Insurance Scheme (NDIS); and
 - (vi) various CT scans, clinical notes, hearing assessment notes and MRI results.

28 There are an additional two documents which the applicant attempted to file, which are not in English and in relation to which no English translation has been provided. The applicant attempted to file these documents by emailing them to my Chambers and was informed that Chambers does not accept documents for filing. The applicant also attempted to file the documents with the Court's Registry and was advised that the documents could not be

accepted for filing unless they were accompanied by an English translation. The applicant then made a further attempt to email the documents to my Chambers.

29 I do not accept these two additional documents as evidence before the Court. The applicant was on notice that the documents can only be accepted for filing if accompanied by an English translation and no such translation has been provided. Even if I were to accept the documents as evidence before the Court, I could not rely on them in my judgment in any way because I cannot read or understand them. I note that the applicant referred in his submissions and in his affidavit to two court summonses for him and his father which were written in Farsi and which the applicant could not afford to have translated. If these are the untranslated documents that he provided to the Court, they would not establish jurisdictional error in the delegate's decision because there was no claim advanced before the delegate to the effect that the applicant would be at risk of harm due to any failure to attend court pursuant to a summons. The delegate was not required to consider or address any claim that was not raised by the applicant or which did not clearly emerge from the materials before the delegate.

30 The Minister filed further submissions and an affidavit of Jared Percy Mintz on 1 May 2024. Mr Mintz annexed to his affidavit a Procedural Instruction issued by the Department of Home Affairs titled 'The Protection Visa Processing Guidelines' with an approval date of 24 January 2024.

CONSIDERATION

The role of the Court in judicial review proceedings

31 The role of the Court in this judicial review proceeding is to rule upon the lawfulness or legality of the delegate's decision by reference to the applicant's complaints about that decision: *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 21; [2022] FCAFC 3 (*Djokovic*) at [17].

32 The Court can only grant relief to the applicant if he establishes that the delegate's decision is affected by jurisdictional error. Jurisdictional error was recently explained by the High Court in *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 98 ALJR 610; [2024] HCA 12 (*LPDT*), where the Court said at [2]-[3] (footnotes omitted):

2. Jurisdictional error can refer to breach of an express or implied condition of a statutory conferral of decision-making authority which results in a decision made in the purported exercise of that authority lacking the legal force

attributed to exercise of that authority by statute. ...

3. Because an express or implied condition of a statutory conferral of decision-making authority can take many different forms, and because breach can occur in many different circumstances, the categories of jurisdictional error are not closed. ... Jurisdictional error on the part of a statutory decision-maker in making a decision can include: misunderstanding the applicable law; asking the wrong question; exceeding the bounds of reasonableness; identifying a wrong issue; ignoring relevant material; relying on irrelevant material; in some cases, making an erroneous finding or reaching a mistaken conclusion; or failing to observe some applicable requirement of procedural fairness.

33 An error made by the delegate will only amount to a jurisdictional error if it was material, ‘in the sense that there is a realistic possibility that the decision that was made in fact *could* have been different if the error had not occurred’: *LPDT* at [7]; see also *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421; [2019] HCA 3 (*SZMTA*) at [45].

34 The Court does not consider the merits of the delegate’s decision: *Djokovic* at [17]; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; [1996] HCA 6 at [31]. This means that the Court does not consider for itself whether the applicant meets the criteria for a protection visa. The Court does not have the jurisdiction to consider whether new information that was not before the delegate, or new claims for protection that were not advanced before the delegate, could lead to a finding that the applicant engages Australia’s protection obligations.

Ground 1

35 By ground 1, the applicant asserts that the delegate’s finding that the applicant did not have a reasonable explanation for producing a bogus document is affected by an error of law and a denial of procedural fairness.

36 The ground is based on the delegate’s application of s 91WA of the Migration Act, which provides:

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
 - (a) the applicant provides a bogus document as evidence of the applicant’s identity, nationality or citizenship; or
 - (b) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant’s identity, nationality or citizenship; or

- (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of documentary evidence; and
 - (b) either:
 - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

37 The applicant's ground referred specifically to the delegate's finding pursuant to s 91WA(2) of the Migration Act. As the Minister identified in his written submissions, this suggests an acceptance by the applicant that s 91WA(1) was satisfied, namely, that the applicant provided a bogus document to the Department in relation to his identity, nationality or citizenship. The Minister nevertheless addressed the ground on the basis that the applicant might also be asserting jurisdictional error in relation to the delegate's finding that he provided a bogus document, and I agree that it is not inappropriate to also consider the applicant's ground on this basis, notwithstanding that the applicant has not made any assertion that the delegate made any error in finding that the Blue Card was a bogus document.

38 The applicant asserted that the delegate made an error of law without identifying what that error of law is. I accept the Minister's submission that the delegate did not make an error of law in its approach to s 91WA of the Migration Act.

39 As the Minister submitted, the delegate was persuaded, based on the consideration of a number of different factors referred to in the summary of the delegate's decision above, that the applicant was not stateless and was instead an Iranian citizen. I accept that it was implicit within the delegate's finding that the applicant knew that he was an Iranian citizen. Having found that the applicant was an Iranian citizen, it followed that the applicant was not entitled to a Blue Card and that the Blue Card must therefore be bogus.

40 The delegate considered the applicant's explanations and submissions regarding the provision of the Blue Card and was not persuaded that the applicant had a reasonable explanation. In reaching this finding, the delegate said:

As I am satisfied that the applicant is an Iranian citizen, I am also satisfied that he is aware that he is not entitled to a foreign residence card. I am therefore not satisfied the applicant was unaware that the documents are bogus. It therefore follows that the applicant has not provided a reasonable explanation for providing the department with bogus identity documents as part of his application for a protection visa.

41 I accept the Minister's submission that the factual findings made by the delegate in relation to s 91WA(1) and (2) were supported by, and were open on, the available evidence and that the delegate adopted a rational reasoning process. I further accept that the delegate did not take into account any irrelevant considerations and took into account all relevant considerations.

42 To the extent that the applicant complains that the delegate denied him procedural fairness, there were two matters raised by the applicant at the hearing that may be seen as relating to his assertion in all three grounds of his application that he was denied procedural fairness, namely, that he was unable to properly understand the interpreter at the hearing, and that he was unable to effectively participate in the hearing due to his health concerns. I address these complaints under separate headings below.

43 I otherwise accept the Minister's submissions that the delegate did not deny the applicant procedural fairness in refusing the application for a protection visa under s 91WA of the Migration Act. The delegate sent a letter to the applicant on 25 August 2017 informing the applicant that the delegate reasonably suspected that the Blue Card was a bogus document within the meaning of s 5(1) of the Migration Act and affording the applicant an opportunity to provide a reasonable explanation for providing a bogus document. In response to this, the applicant's representative sent a letter to the Department on 7 September 2017 requesting further details about why the Department reasonably suspected that the applicant's Blue Card was bogus. An officer of the Department responded on 8 September 2017 explaining why it was believed that the Blue Card was a bogus document. On 19 September 2017 the applicant, via his representative, provided a substantive response to the invitation sent on 25 August 2017. The delegate had regard to this and considered it carefully in reaching the decision.

44 I do not accept that the delegate failed to comply with any procedural fairness obligation.

45 Ground 1 is not established.

Ground 2

46 By ground 2, the applicant asserts that the delegate's finding that the applicant is not a person in respect of whom Australia has protection obligations under s 36(2)(a) of the Migration Act is affected by errors of law and a denial of procedural fairness.

- 47 To the extent that the matters raised in the applicant's oral submissions might be seen as relating to this ground, they are addressed separately below. The concerns that the applicant raised about his ability to effectively participate in the interview with the delegate as a result of his health conditions and difficulties in understanding the interpreter permeate all three grounds in the application, and the assertion of error based on the delegate failing to consider whether he was owed protection based on the data breach raises complex issues in the context of this case which are best addressed separately.
- 48 The only other submission made by the applicant that might be seen as relevant to this ground is a written submission he made on 16 April 2024 which asserted that, in addition to failing to consider the data breach, the delegate failed to consider '[the applicant's] statement, and the primary reason for [his] protection visa application, which was the incident in Iran that [he] was a victim of and [his] resulting disability'.
- 49 In the context in which this sentence appears, it is unclear whether the 'statement' referred to is the statement he provided with his protection visa application or the statement that he made to the OAIC in relation to the data breach. The latter cannot give rise to jurisdictional error, as the applicant's statement to the OAIC was made in 2019 after the delegate's decision and therefore could not have been taken into account by the delegate. I am satisfied that the delegate had regard to the claims advanced in the applicant's statement provided with his protection visa application, including in relation to the incident in Iran that resulted in his disability.
- 50 In the statement he provided with his protection visa application, the applicant gave details of an incident where he was walking on the street and a group of people ran past being chased by the police with batons in their hands. The applicant became scared and started running with the others to try and run away and was caught and arrested by the police, who made random allegations against him that he was a thief and beat him with their batons. When the police interrogated him, he provided them with his documents and explained that he was not involved in politics but got scared and started running with this group. The applicant's evidence was that the police accepted his explanation and left him alone. The applicant was released after about a week but suffered disabilities due to his mistreatment by the police. The applicant said in the same statement that he has suffered both mentally and physically from the injuries he sustained and has trouble concentrating and making decisions. The applicant

worried about his ability to work and did not think he could live safely in any part of Iran because the authorities and government would continue to discriminate against him.

51 The applicant also provided a post-interview written submission to the delegate, via his representative, in which he asserted that the risk of discrimination to him as a Faili Kurd is significantly greater because of his need for medical treatment, which he receives in Australia but which may not be accessible to him in Iran, and which will also limit his ability to find employment. In summarising the applicant's claims, the delegate also recorded a claim that the applicant would be easily identifiable by border authorities upon his return to Iran due to his physical injuries, including his facial injuries, which would suggest political involvement.

52 I am satisfied the delegate considered all the claims raised in the statement, but in this judgment I only refer to the specific claims that the applicant mentioned in his submission to the Court. The delegate considered and accepted the applicant's account of the incident in 2009 where he was detained and beaten by the police. The delegate did not accept that the applicant's physical injuries, including facial injuries, that he sustained in this incident would give rise to a suspicion that he was politically active, noting that he had remained in Iran for several years after the 2009 incident without issue, which suggested he was not of any ongoing interest to the authorities. The delegate therefore did not consider that the applicant would face harm from any imputed political opinion. The delegate also considered the applicant's economic vulnerability and found that, as an Iranian citizen, the applicant had equal access to employment and basic services and noted that the applicant's family had been able to save a sizeable sum of money to treat the applicant's medical issues and to send him abroad. On this basis, the delegate was satisfied that the applicant would not face a real chance of serious harm on account of any economic vulnerability.

53 I am satisfied that the delegate considered all of the claims as they were raised by the applicant. The applicant did not claim to face ongoing harm as a result of the 2009 incident save for the possibility that his injuries may cause him to be perceived to have a particular political profile and that his health issues would impact his capacity to subsist, and there is no further claim that clearly emerges from the materials based on established facts: see *NABE v Minister for Immigration and Indigenous Affairs (No 2)* (2004) 144 FCR 1; [2004] FCAFC 263 (*NABE*) at [68]; *AYY17 v Minister for Immigration and Border Protection* (2018) 261 FCR 503; [2018] FCAFC 89 (*AYY17*) at [18]. The delegate made findings and considered the

issues raised in the applicant's statement and no jurisdictional error arises on the basis asserted by the applicant.

54 I otherwise accept the Minister's submission that ground 2 does not establish jurisdictional error.

55 First, I accept the Minister's submission that if there was an error as asserted by ground 2, it could not be material because the delegate's findings for the purposes of s 91WA of the Migration Act meant that the application for a protection visa had to be refused.

56 Further, I accept the Minister's submission that the delegate considered all of the applicant's claims and made findings that were open to it on the evidence before it.

57 To the extent that by this ground the applicant asserts denial of procedural fairness, considerations regarding the fairness of the interview are addressed below. There is otherwise nothing in the materials before the Court to suggest that the delegate failed to comply with its procedural fairness obligations in Subdivision AB of Division 3 of Part 2 of the Migration Act.

58 Ground 2 does not establish jurisdictional error.

Ground 3

59 By ground 3, the applicant asserts that the delegate's finding that the applicant is an 'excluded fast track review applicant' is affected by an error of law or a denial of procedural fairness, including a failure to comply with s 57 of the Migration Act.

60 The term 'excluded fast track review applicant' is defined in s 5(1)(a)(iv) of the Migration Act to include a fast track applicant 'who, in the opinion of the Minister... without reasonable explanation provides, gives or presents a bogus document to an officer of the Department or to the Minister (or causes such a document to be so provided, given or presented) in support of his or her application'.

61 Under s 57 of the Migration Act, the Minister must give to an applicant particulars of information that would be the reason, or part of the reason, for deciding that the applicant is an 'excluded fast track review applicant' in a way that the Minister considers appropriate in the circumstances. The Minister must ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the consideration of the application and invite the applicant to comment on it.

62 In the present case, the letter sent to the applicant on 25 August 2017 included information about the possibility that the delegate would find that the applicant is an excluded fast track review applicant if it is found that he provided a bogus document without reasonable explanation (see the final paragraph of the extract at [8] above). The applicant was invited to comment on this information and the delegate took the response into account in deciding that the applicant was an excluded fast track review applicant.

63 The delegate's reasons for finding that the applicant was an excluded fast track review applicant were based on similar reasoning to its finding for the purpose of its assessment under s 91WA of the Migration Act, namely that the applicant provided a bogus document without a reasonable explanation.

64 I am satisfied, based on the material before the Court, that the delegate complied with the relevant procedural fairness obligations, including s 57 of the Migration Act, in finding that the applicant was an excluded fast track review applicant. I am also satisfied that the finding made by the delegate and the reasoning process employed in making that finding were open to the delegate, for the same reasons that it was open to the delegate to find that the applicant had provided a bogus document without reasonable explanation for the purposes of s 91WA of the Migration Act.

65 Ground 3 does not establish jurisdictional error.

Ground 4

66 Ground 4 is merely a statement that the applicant applied to Victoria Legal Aid for assistance with this matter. It does not assert or establish jurisdictional error in the delegate's decision.

Additional issues raised in the applicant's submissions

The applicant's health conditions and his ability to participate in the interview

67 The applicant submitted at the hearing before the Court that, at the interview before the delegate, he was 'really unwell' and 'physically and mentally' he was not in a good situation. It was implicit in the applicant's submission that he was asserting he was unable to effectively participate in the interview before the delegate.

68 During the hearing, I reviewed the medical documents that the applicant had provided to the delegate, which were contained in the court book. I observed to the applicant that none of these documents suggested that he was unable to effectively participate in the interview due

to any medical condition. I expressly invited the applicant to refer to any particular medical evidence that he wanted me to take into account but he did not identify anything specific. The applicant was given an opportunity to adduce further evidence after the hearing and he adduced a large number of medical documents.

69 I have carefully considered the medical evidence in the court book and the additional medical evidence provided by the applicant after the hearing. While I accept, based on this evidence, that the applicant has a number of medical conditions, there is no evidence that states that the applicant was unable to effectively participate in the interview due to any medical condition. I accept the Minister's submission that for there to be jurisdictional error on the basis that the applicant was unable to effectively participate in the hearing due to medical issues, the medical evidence would need to demonstrate that the applicant was unfit to give evidence, present arguments and answer questions in the course of the interview: *Minister for Immigration and Citizenship v SZNCR* [2011] FCA 369 at [30]. In the absence of evidence of this nature, the applicant has not established that the delegate's decision is affected by jurisdictional error because of any health condition of the applicant on the day of the interview.

70 Further, the delegate expressly considered the impact of the applicant's health conditions on his ability to give evidence and said in the decision record:

A range of medical documents were provided as part of the submission. It is submitted that these documents indicate the applicant has a number of mental health and hearing issues that could impact his ability to clearly communicate during the PV interview. Overall, I am satisfied that the applicant answered the questions asked of him and appeared to understand the nature of these questions. Further to this, I have considered submissions made on the applicant's behalf by a migration agent. I am satisfied that the applicant was able to raise and explain his claims and circumstances.

71 This shows the delegate was alive to the possibility that the applicant's health conditions may impact his performance at the interview and made an express finding that the applicant was able to effectively participate. The medical evidence before the Court does not suggest that this finding was made in error.

72 On the basis of the evidence before the Court, I do not find that the applicant was unfit to participate in the interview because of his medical conditions. No jurisdictional error is established on this basis.

Issues with the interpretation at the interview

73 The applicant submitted at the hearing before the Court that he was given an interpreter at the interview who was a Sorani Kurdish interpreter and he could not understand a lot of the words that the interpreter used because he speaks Fali Kurdish. The applicant was given an opportunity following the Court hearing to adduce evidence to show that there were issues with interpretation at the interview before the delegate but he has not provided any such evidence. There is nothing in the court book to indicate that there were any issues in relation to the interpretation and nothing in the submissions from the applicant's representative to the delegate or in the delegate's decision to suggest that any concerns were raised by the applicant about his ability to understand the words used by the interpreter during the interview.

74 There is no evidence before the Court from which the Court could conclude that the applicant had any difficulty participating in the interview with the delegate because of any inability to understand the interpreter. No jurisdictional error arises based on difficulties with interpretation.

Data breach

75 The evidence before the Court discloses that:

- (p) the applicant's personal information was publicly accessible during the Department's 2014 data breach and the applicant was notified of this in a letter from the Department dated 14 March 2014;
- (q) the delegate did not refer to the data breach in the decision record and did not assess whether the disclosure of the applicant's personal information established that the applicant met the refugee criterion in s 36(2)(a) of the Migration Act or the complementary protection criterion in s 36(2)(aa) of the Migration Act; and
- (r) the applicant did not, at least in the written documents he provided to the delegate, claim that he would face harm in Iran as a consequence of the data breach.

76 There is no transcript of the interview that the applicant attended with the delegate in evidence before the Court and no evidence to suggest that the applicant orally claimed that he would face harm as a result of the data breach.

77 The applicant has provided a statement he made to the OAIC in April 2019 in relation to the data breach, but that statement post-dates the delegate's decision and does not disclose that the applicant claimed to the delegate to fear harm in Iran as a result of the data breach.

78 The applicant's submission to the Court is to the effect that he was affected by the data breach and the delegate should have considered this.

79 The Minister in his further written submissions referred to the Procedural Instruction that was annexed to the affidavit of Mr Mintz and extracted the following passages from that document:

For individuals affected by the privacy breaches who have not yet lodged a PV application and those with PV applications in progress which have not yet been decided, it is their responsibility to raise any claims that the privacy data breach/es could give rise to *sur place* protection claims.

...

If the COI note indicates that an applicant is affected by either the 2014 or 2022 privacy data breaches but there is no information to suggest a protection claim has been made in relation to these incidents, an acknowledgement that no such claim has been made should be made in the decision record.

80 Based on this, the Minister submitted that, as the applicant made his protection visa application some time after he was notified of the data breach, it was a matter for the applicant to raise the data breach in his application. The Minister conceded that the delegate did not follow the practice suggested in the Procedural Instruction and did not note that the applicant was affected by the privacy breach but made no protection claim to the Department based on the breach. However, the Minister submitted that a failure to mention the possibility of a claim never made, on its own, would not have amounted to legal error.

81 Further, the Minister submitted that, even if it be assumed in the applicant's favour that there is an argument available to him for some error based on a failure to consider a claim arising on the materials known to the Department, there was no jurisdictional error in the present case. That is because once the applicant was found by the delegate to have breached s 91WA(1)(a) of the Migration Act by submitting a bogus document as part of his evidence of his nationality for the purposes of his visa application, s 91WA(1) *required* that the visa application be refused. There was no other course open to the delegate in circumstances where the delegate was not satisfied that the applicant had a reasonable explanation for providing the bogus document: see s 91WA(2)(a) of the Migration Act.

82 Ordinarily, the Court would assess whether a decision-maker has made an error before considering whether the error is material. I do not take that course in the present case. For the reasons explained below, I have some concerns about the evidence before the Court and, if I considered this issue to be determinative of the outcome of the judicial review application, I would have called the matter back for a further hearing. However, I accept the Minister's submission on materiality. Therefore, irrespective of whether the delegate erred in failing to consider whether the applicant engaged Australia's protection obligations as a result of the data breach, any such error would not be jurisdictional because the delegate was compelled to reject the visa application upon finding that the applicant provided a bogus document without a reasonable explanation. Any error in failing to consider the data breach therefore could not have realistically deprived the applicant of the possibility of a successful outcome: see *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; [2018] HCA 34 at [30]; *SZMTA* at [2]; *LPDT* at [16].

83 The concerns that I have about the evidence regarding whether the delegate erred by failing to consider the data breach, and the reasons I would have invited further submissions if I did not accept the Minister's materiality submission, can be summarised as follows:

- (s) Assuming that the applicant did not expressly articulate a claim to fear harm as a result of the data breach, the delegate may still have had an obligation to consider such a claim if it clearly emerged on the materials before the delegate based on established facts: *NABE* at [68]; *AYYI7* at [18]. Although it appears that the Department held information at the time of the delegate's decision that the applicant's personal information had been disclosed in the Department's 2014 data breach, the Minister has not conceded, and it is not apparent from the evidence before the Court, that that information was in the bundle of documents or other records before the delegate. In the absence of any concession by the Minister to the effect that the information about the applicant's details being disclosed in the data breach was actually or constructively before the delegate, issues may have arisen in relation to whether the information was actually or constructively before the delegate or whether the delegate had any obligation to conduct further searches of the records held by the Department.
- (t) The Minister's reliance on the Procedural Instruction gives rise to two concerns:

- (i) first, the assessment of whether an unarticulated claim emerged clearly from the materials before the delegate, based on established facts, should be made with reference to established principles articulated in case law. It should not be assessed by reference to an internal policy document of the Department that suggests that a claim based on the data breach only needs to be considered when expressly raised by an applicant; and
- (ii) second, the version of the Procedural Instruction annexed to Mr Mintz's affidavit was not in effect at the time of the delegate's decision on 7 May 2018. The approval date recorded on the face of the document is 4 January 2024, almost six years after the delegate's decision. Even if an earlier version of this document was in existence at the time of the delegate's decision, there have clearly been amendments to Annexure 4 relating to the processing of cases affected by privacy data breaches, because that annexure refers to data breaches in 2020 and 2022 which both occurred after the delegate's decision. I have no way of knowing, based on the evidence before the Court, the content of the Procedural Instruction (if any such instruction existed) at the time of the delegate's decision.

84 I therefore do not consider that I am in a position to properly assess whether the delegate erred by failing to consider whether the applicant engaged Australia's protection obligations as a result of the data breach. While the applicant bears the onus of establishing jurisdictional error, the evidence that may be relevant to considering this issue is evidence that one would ordinarily expect to be in the Minister's or the Department's possession or control. I have opted not to invite the parties to provide further evidence and submissions on this issue because, whatever that evidence may reveal and whatever I may find based on my consideration of any further evidence and submissions, I would still accept the Minister's materiality submission in circumstances where the delegate applied s 91WA and where I have not found jurisdictional error in any aspect of the delegate's decision relating to the application of s 91WA. It would therefore not facilitate the just resolution of this application as quickly, inexpensively and efficiently as possible to invite further evidence and submissions on this issue: see s 190 of the *Federal Circuit and Family Court of Australia Act 2021* (Cth).

CONCLUSION

- 85 The applicant has not established that the delegate's decision is affected by jurisdictional error. His application for judicial review must therefore be dismissed.

I certify that the preceding eighty-five (85) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Ladhams.

Associate:

Dated: 31 May 2024